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16 Debtor in Possession ANTHONY S. LEVANDOWSKI

17 **UNITED STATES DISTRICT COURT**  
18 **NORTHERN DISTRICT OF CALIFORNIA**  
19 **SAN FRANCISCO DIVISION**

19 In re:  
20 ANTHONY SCOTT LEVANDOWSKI,  
21 Debtor.

Bankruptcy Case  
No. 20-30242 (HLB)  
Chapter 11

Hon. Hannah L. Blumenstiel

**Adv. Pro. No. 20-03050 (HLB)**

23 ANTHONY LEVANDOWSKI, an individual,  
24 Plaintiff,  
25 v.  
26 UBER TECHNOLOGIES, INC.,  
27 Defendant.  
28

**PLAINTIFF'S OPPOSITION TO  
UBER'S MOTION *IN LIMINE*  
BARRING EVIDENCE AND  
ARGUMENT IN SUPPORT OF  
PLAINTIFF'S ALLEGED  
CONSEQUENTIAL DAMAGES CLAIM**

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1     **I.     INTRODUCTION.**

2             Mr. Levandowski should be permitted to present evidence and testify at trial regarding the  
3     harm he suffered and the losses he incurred as a result of Uber’s breach of the Indemnification  
4     Agreement. Uber’s motion *in limine* should be denied for the following reasons.

5             First, Uber misreads the Indemnification Agreement. Uber argues that Mr. Levandowski’s  
6     claim for damages is barred because the Indemnification Agreement limits his remedies to seeking  
7     indemnification only for “Expenses” (as that term is defined) resulting from an Indemnified Claim.  
8     But the portion of Mr. Levandowski’s claim for damages addressed in Uber’s motion is based on  
9     Uber’s breach of the Indemnification Agreement itself, not on any Indemnified Claim. Nothing in  
10    the Indemnification Agreement limits Mr. Levandowski’s remedies for Uber’s breach of contract.

11            Second, Uber’s contention that Mr. Levandowski’s damages evidence is subject to  
12    exclusion because he did not adequately disclose his damages to Uber is unfounded and should be  
13    rejected. In discovery, Mr. Levandowski provided a description of the basis for his damages and  
14    quantified them. Uber also had the opportunity to depose two witnesses, including Mr.  
15    Levandowski and Randy Miller, that were identified as having knowledge about the claimed  
16    damages arising directly from Uber’s failure to fulfill its obligations under the Indemnification  
17    Agreement.

18            Third, the remaining arguments in Uber’s motion are not appropriate grounds for a motion  
19    *in limine*. Uber improperly asks the Court to make credibility determinations based on testimony  
20    that, according to Uber, is supposedly conflicting. Mr. Levandowski should be permitted to present  
21    the evidence so that the Court, as the trier of fact at trial, can make a determination as to Mr.  
22    Levandowski’s damages claim.

23     **II.     BACKGROUND.**

24            **A.     Relevant Provisions of the Indemnification Agreement.**

25            As Uber points out, in the Indemnification Agreement, Uber agreed to “indemnify and hold  
26    harmless [Mr. Levandowski], to the maximum extent permitted by applicable Law . . . , from and  
27    against any and all *Expenses* incurred by [Mr. Levandowski], arising out of any [*Indemnified*  
28    *Claim*].” Dkt. No. 49-3 (“Indemnification Agreement”) § 2.1(a) (emphasis added). “Indemnified

1 Claim” is defined as including any claim brought by a Former Employer if the claim is “alleged to  
2 arise out of” (1) a patent/trade secret/confidential information claim, (2) a breach of  
3 loyalty/fiduciary duty claim, and/or (3) a breach of non-solicitation, non-competition, or  
4 confidentiality agreement claim. *Id.* The term “Expenses,” as defined in the Indemnification  
5 Agreement, expressly refers to only those Expenses arising out of Indemnified Claims. In fact,  
6 Section 2.4(c) of the Indemnification Agreement specifically provides that Mr. Levandowski’s  
7 right to seek indemnification as his sole remedy applies only “with respect to all Expenses **resulting**  
8 **from or arising out of any Indemnified Claim.**” *Id.* § 2.4(c) (emphasis added).

9 But none of the provisions relied on by Uber in its motion relate to the portion of Mr.  
10 Levandowski’s claim for damages that is the subject of Uber’s motion. The reason is simple –  
11 those claimed damages arise out of Uber’s **breach** of the Indemnification Agreement, not an  
12 Indemnified Claim. So the only relevant provisions of the Indemnification Agreement that apply  
13 to Mr. Levandowski’s damages claim are Sections 3.11 and 3.14, which Uber ignores entirely in  
14 its motion. Under Section 3.14, Uber expressly guaranteed: (1) “to take all actions necessary . . .  
15 to perform all of its agreements, covenants and obligations” under the contract; (2) “full and  
16 complete performance” of the Indemnification Agreement; and (3) that it “shall be liable for any  
17 breach of any covenant or obligation” set forth therein. *Id.* § 3.14. Section 3.11 provides for  
18 remedies in the event of Uber’s breach of the Indemnification Agreement. Mr. Levandowski, as  
19 the **nonbreaching** party, “shall be entitled to seek injunctive relief,” specific performance, and/or  
20 “**any other remedy to which a non-breaching party may be entitled at law.**” *Id.* § 3.11 (emphasis  
21 added). Mr. Levandowski is entitled to seek damages for Uber’s breach of Indemnification  
22 Agreement.

### 23 **B. Uber’s Breach of the Indemnification Agreement.**

24 On October 28, 2016, Google commenced two arbitration proceedings against Mr.  
25 Levandowski. Dkt. No. 49-6 at 9-20, 29-49. Mr. Levandowski promptly tendered his defense to  
26 Uber. Uber accepted the tender and agreed to defend and indemnify Mr. Levandowski in the  
27 *Google v. Levandowski* arbitration. Dkt. No. 128-15 at 2.

28 In March 2019, the arbitrators issued an interim award in favor of Google. *See* Dkt. 63-1

1 at ii. The panel found Mr. Levandowski liable for breach of the duty of loyalty, breach of his  
2 employment agreements, and breach of certain noncompetition and nonsolicitation obligations. *Id.*  
3 at 47, 66, 67, 74, 84, 86-87.

4 On August 30, 2019, Uber informed Mr. Levandowski that it was rescinding the  
5 Indemnification Agreement and would not indemnify Mr. Levandowski for the award in favor of  
6 Google. Dkt. No. 49-11.<sup>1</sup> On March 6, 2020, Mr. Levandowski requested that Uber advance  
7 payment for Google's judgment and the attorneys' fees and costs Mr. Levandowski had incurred  
8 between September 26, 2019 and February 29, 2020 as Expenses arising from Indemnified Claims.  
9 Dkt. No. 49-16. Uber refused to advance payment for such Expenses and has continued to refuse  
10 to pay for Expenses. Dkt. No. 49-17. Following entry of the judgment in Google's favor and  
11 Uber's refusal to pay the judgment, Mr. Levandowski was forced to file a chapter 11 petition for  
12 bankruptcy.

13 **C. Mr. Levandowski Adequately Disclosed the Damages He Incurred as a Result**  
14 **of Uber's Breach of the Indemnification Agreement.**

15 As a result of Uber's refusal to honor its obligations under the Indemnification Agreement,  
16 Mr. Levandowski has suffered damages. Over the course of this Adversary Proceeding, Mr.  
17 Levandowski has provided sufficient information to adequately disclose the nature and scope of his  
18 damages. Uber acknowledges that Mr. Levandowski disclosed at the outset of this proceeding that  
19 he intended to seek "the costs of the chapter 11 proceedings and this adversary proceeding and  
20 having to liquidate assets in the middle of a pandemic" as damages for Uber's breach of contract.  
21 Uber Br. at 3 (citing Dkt. No. 49 ¶ 170). Uber also admits that Mr. Levandowski identified himself  
22 and Randy Miller as individuals with knowledge as to Mr. Levandowski's damages. *Id.* Shortly  
23 thereafter, on January 15, 2021, Uber served Mr. Miller with a notice of subpoena to appear for  
24 deposition and produce documents. Schuman Decl., Ex. N. Mr. Miller was deposed and his  
25 document production was provided to Uber. *Id.*, Ex. K at 13:10-14:6.

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<sup>1</sup> Uber has since abandoned its rescission claim. Dkt. No. 143.

1 **III. UBER HAS FAILED TO PROVIDE ANY VALID JUSTIFICATION FOR THE**  
2 **EXCLUSION OF EVIDENCE AND ARGUMENT IN SUPPORT OF MR.**  
3 **LEVANDOWSKI'S CLAIM FOR DAMAGES ARISING FROM UBER'S BREACH.**

4 **A. Mr. Levandowski's Claimed Damages Are a Recoverable Remedy for Uber's**  
5 **Breach of the Indemnification Agreement.**

6 Uber spends the majority of its motion *in limine* arguing that Mr. Levandowski is not  
7 entitled to damages under Uber's incorrect interpretation of the Indemnification Agreement.  
8 According to Uber, Mr. Levandowski's sole remedy is a right to recover from Uber any outstanding  
9 Expenses arising from a Former Employer's Indemnified Claim. But Uber fails to acknowledge  
10 that the portion of Mr. Levandowski's damages claim at issue here arises out of Uber's breach of  
11 the Indemnification Agreement, not a Former Employer's Indemnified Claim.

12 In particular, Section 3.11 of the Indemnification Agreement expressly entitles Mr.  
13 Levandowski to seek any "remedy to which a non-breaching party may be entitled at law" for  
14 Uber's breach of the Indemnification Agreement, including damages. Indemnification Agreement  
15 § 3.11 (the nonbreaching party "shall be entitled to seek injunctive relief," specific performance,  
16 and "any other remedy to which a non-breaching party may be entitled at law"); *see Pat.*  
17 *Scaffolding Co. v. William Simpson Const. Co.*, 256 Cal. App. 2d 506, 510 (1967) (providing that  
18 indemnitee was entitled to recover damages for "all detriment proximately caused by Simpson's  
19 breach of its contractual duty to indemnify").

20 Uber wholly ignores Section 3.11—the governing provision for breach of contract  
21 remedies—in arguing that Mr. Levandowski's is not entitled to damages for Uber's breach. Uber  
22 contends that the Indemnification Agreement precludes recovery of damages based solely on the  
23 interplay between Section 2.4(c) and the definition of the term "Expenses." Section 2.4(c) provides  
24 that Mr. Levandowski's "right to seek indemnification . . . constitutes [his] sole and exclusive  
25 remedy . . . with respect to all Expenses resulting from or arising out of any Indemnified Claim."  
26 Indemnification Agreement § 2.4(c). Uber then argues that, because Expenses are defined to  
27 "exclude special, consequential, indirect, exemplary or punitive damages, unless such Expenses  
28 were specifically awarded in a Final Judgment [on an Indemnified Claim]," Mr. Levandowski is  
precluded from seeking consequential damages because Google was not awarded any such damages



1 in arbitration. Uber Br. at 7. Uber ties these two provisions together to argue that Mr. Levandowski  
2 cannot recover consequential damages because those damages do not constitute Expenses as  
3 defined in the Indemnification Agreement and his sole remedy is indemnification.

4 Uber's argument fails under a plain reading of the Indemnification Agreement. Mr.  
5 Levandowski's breach of contract remedies are expressly set forth in Section 3.11, which Uber  
6 ignores. Moreover, the term Expenses, as used in the Indemnification Agreement, refers only to  
7 those Expenses incurred in connection with a Former Employer's Indemnified Claim. The portion  
8 of Mr. Levandowski's claim for damages that is the subject of Uber's motion is not premised on  
9 his entitlement to indemnification from Uber for Expenses arising from Google's arbitration claims.  
10 Rather, Mr. Levandowski seeks recovery of the damages he incurred as a result of Uber's breach  
11 of the Indemnification Agreement. *See Peregrine Pharms., Inc. v. Clinical Supplies Mgmt, Inc.*,  
12 2014 WL 3791567, at \*6 (C.D. Cal. July 31, 2014) (providing that a standard indemnity agreement,  
13 which guarded one party against third-party claims, did not apply to claims between the contracting  
14 parties). The definition of Expenses has no bearing on Mr. Levandowski's ability to recover for  
15 damages proximately caused by Uber's breach of its obligations under the Indemnification  
16 Agreement. Indeed, the absence of any reference in Section 3.11 to Expenses demonstrates that  
17 the term is irrelevant in determining the scope of Mr. Levandowski's remedies for Uber's breach  
18 of contract.

19 Uber incorrectly characterizes Mr. Levandowski's claimed damages as consequential, or  
20 special, damages. However, the harm Mr. Levandowski suffered as a result of Uber's breach of  
21 the indemnification agreement was not "secondary or derivative" harm that only indirectly resulted  
22 from Uber's breach. The damages are the direct result of Uber's breach. Even if some or all of  
23 the damages at issue here could be characterized as consequential, they clearly were within the  
24 contemplation of Mr. Levandowski and Uber when the Indemnification Agreement was negotiated  
25 and executed and, therefore, are still recoverable. Mr. Levandowski and Uber specifically  
26 contemplated the harm that would be caused if Google sued him and Uber didn't indemnify him.  
27 *See Schuman Decl.*, Ex. L at 3-4 (acknowledging the likelihood of a "[REDACTED]" litigation); *id.*,  
28 Ex. O at 410:17-414:9 (Mr. Levandowski testifying that he expressed concern that Google would



1 use its resources to “[REDACTED]” if “[REDACTED],” but Uber assured him that, as a  
2 big company, it had the resources to “[REDACTED]”; *id.* at 414:15-415:2 (Mr.  
3 Levandowski testifying that he had “[REDACTED]” conversations with Uber regarding the terms  
4 of the Indemnification Agreement as it was an “[REDACTED]”). He warned Uber about  
5 Google’s potential wrath and that it could wipe him out. *See id.*, Ex. O at 410:17-415:2. This was  
6 the very reason he insisted on Uber agreeing to indemnify him – to mitigate the risk of being wiped  
7 out by Google. The fact that he was forced to file for bankruptcy, and the financial harm that filing  
8 caused Mr. Levandowski, was part of the bargain he made with Uber at the time they signed the  
9 Indemnification Agreement and Mr. Levandowski’s claimed damages were a readily foreseeable  
10 consequence of Uber’s breach.

11 So, even if the Court finds that Mr. Levandowski’s damages are consequential, the  
12 Indemnification Agreement still allows him to pursue these damages from Uber as a remedy for  
13 Uber’s breach under Section 3.11. Mr. Levandowski should be permitted to introduce evidence in  
14 support of his damages claim at trial.

15 **B. Mr. Levandowski Adequately Disclosed His Damages Claims.**

16 Mr. Levandowski adequately disclosed the nature and amount of his damages claim in a  
17 written interrogatory response. Schuman Decl., Ex. J at 6-7. Mr. Levandowski, among other  
18 things: (1) provided a detailed description of the nature and factual basis for his claim for damages;  
19 (2) estimated that his losses due to the sale of Murphy Parkway are at least \$1 million; (3) estimated  
20 that his total losses for the Telegraph Property are approximately the \$10 million loan (plus accrued  
21 interest) to NGI East Bay Portfolio LLC plus the portion of the \$13.8 million in equity in NGI  
22 allocated to Telegraph; (4) referred Uber to the data room Mr. Levandowski set up in the chapter  
23 11 proceeding for additional information on the computation of damages; and (5) referred Uber to  
24 the testimony of Randy Miller for additional information on the computation of damages. *Id.*

25 In addition to Mr. Levandowski’s written discovery responses, Uber also had the  
26 opportunity to depose both Mr. Levandowski and Randy Miller and review a document production  
27 from Mr. Miller with further information as to the nature and amount of Mr. Levandowski’s  
28 damages. *See Copart, Inc. v. Sparta Consulting, Inc.*, 2018 WL 1871414, at \*12 (E.D. Cal. Apr.

1 19, 2018) (denying a motion *in limine* to exclude evidence regarding damages that was disclosed  
2 in an interrogatory response); *Crescenta Valley Water Dist. v. Exxon Mobil Corp.*, 2013 WL  
3 12095206, at \*2-3 (C.D. Cal. June 24, 2013) (denying a motion *in limine* to exclude damages  
4 evidence that was disclosed through deposition testimony and deposition exhibits). Uber has been  
5 given adequate notice of the basis for and calculation of Mr. Levandowski's damages.

6 **C. Challenges to Credibility Are Inappropriate Grounds for Excluding Evidence**  
7 **on a Motion *in Limine*.**

8 Uber devotes a substantial portion of its brief addressing purported discrepancies between  
9 Mr. Levandowski's disclosures and Mr. Miller's testimony concerning Mr. Levandowski's  
10 damages, but to the extent Uber contends that such discrepancies constitute grounds for the  
11 exclusion of evidence, Uber is incorrect.

12 "[I]t is the exclusive function of the [trier of fact] to determine the credibility of the  
13 witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts." *Bruce*  
14 *v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004). "When there is conflict between answers supplied  
15 in response to interrogatories and answers obtained through other questioning, either in deposition  
16 or trial, the finder of fact must weigh all of the answers and resolve the conflict." *Victory Carriers,*  
17 *Inc. v. Stockton Stevedoring Co.*, 388 F.2d 955, 959 (9th Cir. 1968). Consequently, attacks on a  
18 witness's credibility or the presence of evidentiary conflicts are not appropriate grounds for the  
19 exclusion of evidence on a motion *in limine*. See, e.g., *United States v. Loza*, 2021 WL 4861787,  
20 at \*2 (C.D. Cal. Oct. 19, 2021) ("potentially conflicting evidence is not a basis to exclude"); *Perez*  
21 *v. Rash Curtis & Assocs.*, 2019 WL 1765875, at \*10 (N.D. Cal. Apr. 22, 2019) (denying a motion  
22 *in limine* that "relie[d] on attacks regarding the witnesses' credibility, weight of the purported  
23 evidence, and factual disputes"); See *GSI Tech., Inc. v. United Memories, Inc.*, 2015 WL 12942201,  
24 at \*4 (N.D. Cal. Oct. 14, 2015) (denying a motion *in limine* because it is the finder of fact's  
25 "responsibility to weigh facts and judge the credibility of one [witness] over another").

26 Uber's contention that any alleged conflicts between Mr. Levandowski's sworn  
27 interrogatory responses regarding his damages and Mr. Miller's testimony justify the exclusion of  
28 any evidence of Mr. Levandowski's claimed damages is expressly contrary to evidentiary law.

1 **IV. CONCLUSION.**

2 For the above stated reasons, this Court should deny Uber's motion *in limine* and permit  
3 Mr. Levandowski to present any argument and evidence in support of his claim for damages  
4 incurred as a result of Uber's breach of the Indemnification Agreement.  
5

6 Dated: February 7, 2022

GOODWIN PROCTER LLP

7  
8 By: /s/ Brett M. Schuman

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